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STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 36

MILWAUKEE COUNTY

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WISCONSIN PUBLIC SERVICE  
COMMISSION

CITY OF OAK CREEK,  
by its WATER AND SEWER  
UTILITY COMMISSION

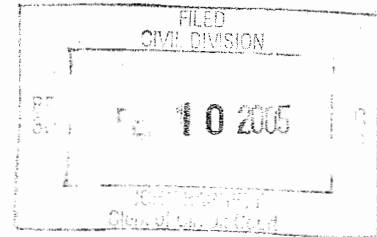
Petitioner,

Case No: 04-CV-007452

vs.

PUBLIC SERVICE COMMISSION  
OF WISCONSIN and CITY  
OF FRANKLIN,

Respondents.



DECISION

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The City of Oak Creek, by its Water and Sewer Utility Commission ("Oak Creek") petitions the Court to review the Final Decision and Order of the Public Service Commission ("PSC" or "Commission"), dated July 26, 2004 (PSC Docket No. 05-BS-124) ("2004 Decision"), pursuant to Wis. Stats. §§196.41 and 227.53. This Court determines that, for the reasons stated herein, the decision of the PSC is affirmed.

#### BACKGROUND

On August 30, 1973, the City of Franklin ("Franklin") entered into a water purchase agreement with Oak Creek. Pursuant to this agreement, Oak Creek would provide retail water service to an area of Franklin called the Southwood East Subdivision. Franklin was to construct water mains and appurtenances ("infrastructure" or "assets") to service the expanding Franklin area. Since it is PSC's policy that a water utility shall provide retail water service over facilities it owns, Oak Creek, at no cost to itself, took

possession of the infrastructure Franklin constructed. The term of the retail water agreement was 30 years.

On March 21, 1979, Franklin and Oak Creek entered into a second water purchase agreement. Pursuant to this agreement, Oak Creek would provide the Rawson Subdivision with retail water service. The term of this agreement was also thirty years. To coincide with the termination of the Southwood agreement, both termination dates were changed to October 8, 2003.

In 1994, Franklin and Oak Creek entered into a third agreement, in which Oak Creek would provide the entire city of Franklin wholesale water service, except those areas of Franklin that were being provided water by the City of Milwaukee and those areas under the Southwood and Rawson agreements.

On December 28, 1994, the PSC issued a decision that required that "all of the approximately 1,000 customers in Franklin who are currently receiving retail water service from Oak Creek, will be transferred so that all of these residents become retail water customers of Franklin within 10 years or sooner as allowed by the agreements between these two municipalities." (PSC Docket No. 2105-CW-100) ("1994 Order"). There was no determination in any of the agreements or in the PSC Order as to how the transfer of customers would occur and how and if the corresponding infrastructure would be transferred to Franklin.

As the end dates of the agreements came closer, Franklin and Oak Creek could not agree on the transfer of customers and infrastructure. Franklin believed that it was entitled, at no cost, to the infrastructure it gave to Oak Creek. Oak Creek believed it was entitled to compensation for the assets. On July 29, 2003, Franklin filed a petition with

the PSC on the issue of the transfer of customers and assets. In 2004, the PSC decided that it was impossible to transfer customers to Franklin without transferring the related distribution infrastructure from Oak Creek to Franklin. The PSC also decided that Oak Creek had no right to compensation, since the 1994 Order did not require payment to Oak Creek as a condition for the transfer of customers to Franklin. Oak Creek petitions this court to review the 2004 Decision of the PSC.

### STANDARD OF REVIEW

Oak Creek seeks review under Wis. Stat. Ch. 227. The PSC's factual findings must be upheld if they are supported by credible and substantial evidence in the record. Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 54 (1983). The test is whether taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." Kitten v. State Dep't of Workforce Dev., 2002 WI 54, ¶ 5. Where one or more inferences may be drawn from the evidence, the drawing of one such permissible inference by PSC is an act of fact finding, and the inference so derived is conclusive on the reviewing court. Universal Foundry Co. v. DILHR, 86 Wis. 2d 582, 589 (1979).

A reviewing court is not bound, however, by an agency's conclusions of law. Richland Sch. Dist. v. DIHLR, 174 Wis.2d 878, 890 (1993). On judicial review, there are three levels of deference which may be given to an administrative agency's conclusions of law, depending on the agency's experience, technical competence, and knowledge in regard to the question presented: great weight, due weight, and *de novo* review. Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 244-45 (1992). A court will accord an agency's determination great weight if: (1) the legislature has charged the

agency with the duty of administering the statute; (2) the agency's interpretation is long standing; (3) the agency used its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. Mattila v. Employees Trust Funds Bd., 2001 WI App 79, ¶ 9.

The "due weight" standard is appropriate when an "agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than the court." UFE, Inc. v. LIRC, 201 Wis. 2d 274, 286 (1996). "The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question." Id. at 286. Under the due weight standard, a court will not overturn a reasonable interpretation "that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." Id., at 286-87.

The *de novo* standard is applicable when the issue before the agency is clearly one of first impression or where the agency's position on an issue has been so inconsistent that it provides no real guidance. Id., at 285 (1996). Under *de novo* review, the agency's determination is given no deference.

The parties disagree over the standard of review to be applied to this case. Oak Creek asks this court to apply the *de novo* standard of review because it claims that the interpretation of an administrative order is one for the court. In interpreting the administrative order, the Court must look to the underlying contracts and contract interpretation issues should be reviewed under a *de novo* standard. Wisconsin End-User

Gas Ass'n v. Pub. Serv. Comm'n, 218 Wis.2d 558, 565 (Ct. App. 1998). Oak Creek also argues the *de novo* standard should apply because the Court must determine whether PSC had the authority to require Oak Creek to transfer assets in the absence of a written agreement. Finally, Oak Creek argues that the issue of judicial estoppel is one that the Court should review *de novo*.

The PSC argues that it is entitled to due weight deference. The PSC has had substantial experience in interpreting the key statutes at issue here and the PSC had substantial evidence to make its decision.

Franklin argues that the great weight standard should be used when reviewing the PSC's decision. The PSC was interpreting its own order and this decision should be given great deference. The PSC's decision calls for value and policy judgments that require the expertise and experience of the PSC.

The PSC's decision will be reviewed under the due weight standard. In this case, the PSC was interpreting its own 1994 Order, not the underlying contracts. Under Wis. Stat. §196.39, the PSC has the right to rescind, change or amend its previous decisions. Although PSC has not dealt with this precise issue before, the legislature has charged the PSC with the enforcement of the statutory scheme in question and regulation of public utilities in Wisconsin in general. The PSC has experience in dealing with retail water service contracts. Under a due weight standard, "an equally reasonable interpretation of a statute should not be chosen over the agency's interpretation." UFE, at 287. If an agency's interpretation of a statute complies with the statutory purpose and is reasonable, the court will not overturn it. Responsible Use of Rural & Agric. Land v. Pub. Serv. Comm'n, 2000 WI 129, ¶ 25. For these reasons, the Court will not overturn the PSC's

decision if the Court finds the interpretation reasonable, unless another interpretation is more reasonable.

### ANALYSIS

Oak Creek argues that the PSC exceeded its authority by determining that the 1994 Order required Oak Creek to transfer the distribution assets to Franklin at no cost. There is no language in the 1994 Order that addressed the issue of transferring the assets and Oak Creek never agreed to transfer the assets at no cost. Oak Creek argues that there are several ways Franklin could service the transferred customers without forcing Oak Creek to transfer the assets at no cost. In addition, Oak Creek argues it is not barred by judicial estoppel because the issue of compensation was not addressed during the 1994 proceeding.

The PSC argues that the evidence supports finding that the assets were to be returned to Franklin at no cost. John Bennett and Norman McGarvie testified that it was expected that the assets would be returned to Franklin at no cost. The PSC also determined that Oak Creek is estopped from demanding payment for the assets. During the 1994 proceeding, it was determined that the Franklin residents that were retail customers of Oak Creek were going to become Franklin customers. During that proceeding, Oak Creek did not assert a right to compensation for the assets Franklin would need to service the new customers. Oak Creek had the opportunity to raise the issue of compensation in 1994 and it did not do so. Since Oak Creek did not address the issue of compensation, it is barred by judicial estoppel from asserting the issue now.

The PSC further argues that it did not exceed its authority by issuing the 2004 Decision. The Commission based its decision on the interpretation of its own 1994

Order. Wis. Stat. § 196.37(2) allows the Commission to make any just and reasonable order related to utility practices or services that are found to be unjust. Wis. Stat. § 196.39(1) allows the Commission to alter or amend its orders. The PSC also determined that even if Oak Creek had a basis to ask for compensation, the assets have zero value since contributed assets have no book value.

Franklin argues that the PSC was interpreting its own 1994 Order when it made the 2004 Decision that Oak Creek was to transfer assets without compensation. This interpretation was reasonable and should be entitled to deference by this Court. In interpreting the 1994 Order, the PSC made a policy decision in regards to the assets. Policy determinations are entitled to great weight deference. Franklin should not have to pay for the infrastructure it donated. City of St. Francis v. Pub. Serv. Comm'n, 270 Wis. 91 (1955). Oak Creek would be unjustly enriched if Franklin would have to buy back the infrastructure it donated to Oak Creek.

In its decision, the PSC determined that Oak Creek was judicially estopped from bringing forth the issue of payment for infrastructure assets. The Court does not agree with the PSC that judicial estoppel applies in this case. Oak Creek did not address the issue of compensation in the previous proceeding. Since Oak Creek did not present a position on compensation in the earlier proceeding, the position it takes now is not inconsistent with its earlier decision. See Salveson v. Douglas County, 2001 WI 100, ¶ 38 (holding that an element of judicial estoppel is that the party's later position must be clearly inconsistent with its earlier position.)

Considering all the arguments however, the Court finds that the PSC's ultimate decision regarding the issue of transferring the assets without compensation, is reasonable

and will be upheld. This is not a case of contract interpretation as Oak Creek wants this Court to rule. The issue before the Court is the PSC's interpretation of its 1994 Order. On page 6 of its 2004 Decision, the Commission laid out the issue. "The Commission finds the case turns on a very straightforward interpretation of the 1994 order in docket 2105-CW-100." The 2004 Decision addresses the meaning of transferring customers that was in the 1994 Order. The PSC reasonably decided that the transfer of customers included the transfer of assets. The PSC has the authority to alter, amend or change its 1994 Order based on Wis. Stat. § 196.39(1), which it specifically referenced in its 2004 Decision. The PSC was acting pursuant to its statutory authority when it interpreted its previous Order.

It is uncontroverted that Franklin constructed the original infrastructure and donated the infrastructure to Oak Creek pursuant to a PSC policy that the water supplier must own the infrastructure which carries the water. It is also undisputed that the issue of compensation was not brought up during the three original contracts. In 1994, the PSC determined that all Franklin residents who were receiving retail water service from Oak Creek would become retail water customers of Franklin. At that time, neither side objected to the 1994 Order. Oak Creek simply thought the issue of compensation for the assets would occur at a later date. In 2004, the Commission decided that to effectuate the 1994 Order, the infrastructure needed to be transferred to Franklin. The Commission weighed the testimony of the parties and found that Franklin believed the assets were going to be returned at no cost. The Commission concluded that if compensation were an issue, it would have been brought up in the prior proceedings. Although Oak Creek's interpretation of the 1994 order is reasonable, the Court does not find Oak Creek's



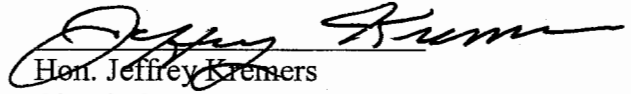
interpretation more reasonable than the PSC's interpretation. Even if the Court agreed with Oak Creek that it was entitled to compensation, the book value of the assets would be zero according to the PSC and recent decisions. City of St. Francis v. PSC, 270 Wis. 91 (1955) and Contributions in Aid of Construction (CIAC), docket no. 05-US-105.

### CONCLUSION

THEREFORE, based on a thorough review of the record and the arguments of the parties, IT IS HEREBY ORDERED that the decision of the Public Service Commission is hereby AFFIRMED.

Dated at Milwaukee, Wisconsin this 10<sup>th</sup> day of February 2005

By The Court:

  
Hon. Jeffrey Kremers  
Circuit Court Branch 36